Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1603

CLARENCE M. DITLOW, *et al.*,
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	4
A. Statement of Facts	5
B. Proceedings Below	8
REASONS FOR GRANTING THE WRIT	9
1. Application Of The *Keogh* Doctrine To This Case Would Immunize Virtually All Price Fixing In Regulated Industries From Private Antiturst Actions	10
2. The *Keogh* Doctrine Should Not Be Extended To This Case Where The CAB And The Aviation Act Have Provided A Measure Of Damages	13
CONCLUSION	16
APPENDIX	
Complaint	1
Order Of The District Court Dismissing The Complaint	9
Judgment Of The Court Of Appeals Vacating The Order Of The District Court Dismissing The Complaint And Remanding To The CAB On Primary Jurisdiction Grounds	12

Page

Order Of The District Court Converting Defendants' Motion To Dismiss Into A Motion For Summary Judgment 12

Stipulation Of Material Facts As To Which There Is No Genuine Issue 13

Order Of The CAB 22

Order Of The District Court Granting Summary Judgment For Defendants 29

Order Of The Court Of Appeals Summarily Affirming The Order Of The District Court Granting Summary Judgment For Defendants 31

Order Of The Court Of Appeals Denying Reharing . . 32

TABLE OF AUTHORITIES

Cases:

Carnation Co. v. Pacific Conference,
383 U.S. 213 (1966) 11

Far East Conference v. United States,
342 U.S. 570 (1952) 12

Federal Maritime Commission v. Seatrain Lines, Inc.,
411 U.S. 726 (1973) 11

Georgia v. Pennsylvania Ry. Co.,
342 U.S. 439 (1944) 11

Gordon v. New York Stock Exchange, Inc.,
422 U.S. 659 (1975) 11

Page

Hughes Tool Co. v. Trans World Airlines, Inc.,
409 U.S. 363 (1973) 11

Keogh v. Chicago & N.W. Ry. Co.,
260 U.S. 156 (1922) . . . . . *passim*

Merrill, Lynch, Pierce, Fenner & Smith v. Ware,
414 U.S. 117 (1973) 11

Silver v. New York Stock Exchange,
373 U.S. 341 (1963) 11

S.S.W., Inc. v. Air Transport Association of America,
191 F.2d 658 (D.C. Cir. 1951),
cert. denied, 343 U.S. 955 (1952) 12

United States v. Borden Co.,
308 U.S. 188 (1939) 11

United States v. National Association of Securities Dealers,
422 U.S. 694 (1975) 11

United States v. Philadelphia National Bank,
374 U.S. 321 (1963) 11

Statutes:

The Judicial Code
28 U.S.C. §1254(1) 2

Federal Aviation Act:
Section 403(b), 49 U.S.C. §1373(b) . . . 3, 5, 8, 12, 13
Section 412, 49 U.S.C. §1382 . . . . . 3, 10
Section 414, 49 U.S.C. §1384 . . . 4, 5, 10, 11, 12, 13

Sherman Act; 15 U.S.C. §1 . . . . . 3, 5, 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Clarence M. Ditlow and the class of airline passengers he represents, hereby petition for a writ of certiorari to review the Order of the United States Court of Appeals for the District of Columbia Circuit, dismissing the complaint against the ten respondents in this case.[1]

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[1] Respondents, ten international air carriers, are Air New Zealand, Ltd., American Airlines, Inc., British Airways, China Airlines, Japan Air Lines, Northwest Airlines, Inc., Pan American World Airways, Inc., Philippine Air Lines, Quantas Airways, and Trans World Airlines, Inc.

OPINIONS BELOW

The unreported opinion of the District Court initially dismissing this action is reproduced at A. 9.[2] The Judgment of the Court of Appeals vacating that dismissal and remanding to the District Court is reported at 505 F.2d 495 and is reproduced at A. 10. The Statement of the CAB as to which fares were in effect is reproduced at A. 22. The unreported opinion of the District Court dismissing this action after remand is repdocuced at A. 29. The Order of the Court of Appeals summarily affirming the District Court's dismissal after remand is not yet reported but is reproduced at A. 31. The unreported Order of the Court of Appeals denying rehearing is reproduced at A. 32.

JURISDICTION

The Order of the Court of Appeals of which review is sought was entered on January 6, 1976. A timely Petition for Rehearing was denied by Order of the Court of Appeals on February 3, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the courts below erroneously extend the doctrine of *Keogh v. Chicago & Northwestern Ry.* to this case where (a) the statutory bases for obtaining an antitrust exemption were not met, but the courts nonetheless found an implied exemption, and (b) the difficulties in measuring damages were not present as they were in *Keogh?*

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[2] Designated pages of the Appendix are preceded by the letter "A."

STATUTES INVOLVED

The Sherman Act, 15 U.S.C. §1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 403(b) of the Federal Aviation Act, 49 U.S.C. §1373(b), provides in pertinent part:

> (b) No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in its currently effective tariffs; . . . .

Section 412 of the Federal Aviation Act, 49 U.S.C. §1382, provides in pertinent part:

> (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier . . . relating to the establishment of transportation rates, fares, charges or classifications. . . .

> (b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; . . . .

Section 414 of the Federal Aviation Act, 49 U.S.C. §1384, provides in pertinent part:

> Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

STATEMENT OF THE CASE

This is a class action seeking damages for a 5% overcharge in air fares which was brought on behalf of 600,000 passengers who flew on respondent air carriers' scheduled flights between points in the United States and points in Asia, Australia, and islands in the Pacific (the "transpacific market") between May 1, 1973 and late July 1973 (the "relevant period").[3] The overcharges were the result

[3] The "relevant period" is defined more precisely in ¶¶14 and 15 of the parties' Stipulation of Material Facts ("Stip.") at A. 18.

of a price-fixing agreement entered into by respondents which violated the Sherman Act because it was not approved by the Civil Aeronautics Board ("CAB") as is required by the Federal Aviation Act in order to obtain antitrust immunity. In addition, because respondents failed to have legally effective tariffs containing the higher fares, they also violated section 403(b) of the Aviation Act, and the passengers who paid the higher rates are entitled to a 5% rebate. The lower courts nonetheless dismissed the complaint on the undisputed facts alleged, thereby denying compensation to the class members and permitting respondents to retain the $24 million they collected in illegal overcharges. The lower court decisions merit review by this Court because they have created implied exemptions from the antitrust laws and the Aviation Act even though air carriers have failed to follow the statutorily mandated procedures.

A. STATEMENT OF FACTS

Since 1946, air fares for international travel have been set by agreement among the members of the International Air Transport Association ("IATA"). (Stip. ¶1; A. 14). Approximately once a year, IATA members meet, set fares, and then charge those fares until new fares are set at the next annual meeting. While price-fixing agreements constitute *per se* violations of the antitrust laws, an IATA agreement is statutorily immunized from the operation of the antitrust laws if the CAB finds that the agreement serves the public interest and then specifically approves that agreement prior to its implementation. (*Id.*; Section 414 of the Aviation Act, 49 U.S.C. §1384).

The fares at issue here were set by agreement among respondents, all of whom are IATA members, in March 1973 when respondents met in London for the purpose of replacing the fares for the transpacific market which were scheduled to go out of effect on March 31, 1973 (the "old fares"). (Stip. ¶¶ 1-3; A. 14-15). At that meeting respondents agreed to increase transpacific fares by 5% after March 31, and two separate agreements were entered into in order to accomplish this. Agreement 23605 (the "interim agreement") took effect on April 1, 1973, but implemented the 5% increase only for the month of April. On May 1, 1973, however, the day after the interim agreement expired, Agreement 23608 (the "permanent agreement") was to re-implement the same increase and was to remain in effect until superseded by a future IATA agreement.[4] Although the higher fares could not be approved on a permanent basis unless they were shown to be in the public interest, respondents apparently believed that the CAB would allow a temporary one-month increase pending inquiry into the justification for the permanent increase.[5]

[4] Other price-fixing agreements were also reached at the London meeting, but they are not relevant to this action.

[5] Generally, respondents submit fare agreements to the CAB well in advance of their effective dates so that the CAB will have time to approve or disapprove them. Here, however, for some unexplained reason, the fare-increase agreements were not submitted to the CAB until two days before the old fares were due to go out of effect. Nevertheless, respondents seemed confident that the interim agreement would be approved, for some of them filed tariffs containing the higher fares even *before* the fare-increase agreements were submitted to the CAB for approval. (Stip. ¶¶ 6 & 7; A. 16).

At first, respondents' strategy seemed to have worked, for the CAB did approve the interim agreement, and respondents began to charge the higher fares on April 1. However, the CAB emphasized the temporary nature of its approval by stating that "the new fares established pursuant to the agreement would be effective through April 30, 1973," and by specifically ordering that "tariffs implementing the subject [permanent] agreements shall not be filed in advance of Board approval of the subject agreements." (Stip. ¶ 10; A. 16). Then two things went wrong with respondents' plan; when the approved interim agreement expired on April 30, 1973, the CAB had still not acted on the permanent agreement, and on July 12, 1973, when the Board finally did act, it *disapproved* the 5% increase for the bulk of the transpacific market.[6]

Despite the CAB's Order not to implement the permanent agreement in advance of Board approval, respondents still charged the higher fares after the interim agreement had expired and continued to do so until the Board specifically rejected the 5% increase in July. Therefore, during the entire relevant period, respondents charged increased fares that had not been justified to the CAB, and they did so without Board approval of the price-fixing agreement on which the fares were based. After the CAB rejected the 5% increase, respondents again charged the old fares. However, by charging the higher fares for two and one-half months longer than authorized, respondents

[6] The increase was disapproved for the North/Central Pacific market which is by far the largest segment of the transpacific market including such major cities as Tokyo, Hong Kong, Bangkok, Manila, and Singapore. The increase was, however, approved for the smaller South Pacific market whose only major cities are Sydney and Melbourne.

overcharged petitioner Ditlow and the other 600,000 class members by an average of $40 each for their tickets, for a total of $24 million in unauthorized fares. It is for those overcharges that petitioners seek damages in this action.

B. PROCEEDINGS BELOW

Petitioner Ditlow filed a complaint in this action alleging violations of the Sherman Act, 15 U.S.C. §1, and section 403(b) of the Federal Aviation Act, 49 U.S.C. §1373 (b), on May 22, 1973. (A. 1). The complaint was dismissed by the District Court for failure to state a claim upon which relief could be granted in an order issued without oral argument or explanatory opinion. (A. 9). Over a year later, the Court of Appeals vacated that dismissal and remanded the case to the CAB on primary jurisdiction grounds for a determination of what fares were in effect during the relevant period. (A. 10).

Petitioners then asked the CAB to consider a number of issues in the case, but it declined to do so. It also refused to accept briefs or hear argument and issued no legal opinion or other explanation for its ruling. Instead, it simply determined as a factual matter that since respondents had not inserted an April 30 expiration date in the tariff filed to implement the one-month interim agreement, the interim fares technically remained in effect throughout the relevant period – May 1 through late July, 1973 (A. 22). Thereafter, the District Court, relying on the CAB's unexplained Order, once again dismissed the complaint. This time it briefly explained that since respondents had charged fares contained in a currently effective tariff, *Keogh v. Chicago & Northwestern Ry. Co.*,

260 U.S. 156 (1922), precluded antitrust recovery for respondents' unapproved price fixing agreement. (A. 29).[7] The Court of Appeals summarily affirmed the District Court's dismissal (A. 31) and denied hearing (A. 32).

REASONS FOR GRANTING THE WRIT

This Court should issue a writ of certiorari in order to settle the uncertainty surrounding the *Keogh* doctrine and its effect upon the operation of antitrust laws in regulated industries. Here, it is undisputed that respondents engaged in price fixing, that the price fixing resulted in a $24 million overcharge to petitioners, and that the price-fixing agreement was not approved by the CAB as required for antitrust immunity. Nevertheless, the courts below denied petitioners compensation for the economic injury they suffered as a result of respondents' price-fixing activities, holding that the *Keogh* doctrine precludes antitrust recovery whenever the agreed-upon rates are contained in effective tariffs.

Petitioners urge this Court to grant the writ because the decision below effectively creates an implied antitrust immunity based upon factors other than those specified by Congress in the Aviation Act. Unlike the statute in *Keogh* which provided no direct avenue for antitrust immunity, the Aviation Act clearly spells out the requirements

[7] The District Court *sua sponte* converted respondents' motion to dismiss into a motion for summary judgment so that it could properly consider the CAB order. (A. 12). Nevertheless, all the material allegations in the complaint, including the existence of the unapproved price-fixing agreement, are conceded by respondents, at least for purposes of its motion to dismiss, and are set out in the Stipulation.

for an exemption, and respondents equally clearly did not satisfy them. Moreover, the concern in *Keogh* about proving damages in the face of an agency-approved tariff is not present here because respondents' actions and those of the CAB eliminate any difficulty in assessing damages. Since the application of the *Keogh* doctrine produces serious injustices by denying compensation to the victims of antitrust conspiracies and by permitting price-fixers to retain their unlawfully obtained profits, it should not have been extended to this case.

1. APPLICATION OF THE *KEOGH* DOCTRINE TO THIS CASE WOULD IMMUNIZE VIRTUALLY ALL PRICE FIXING IN REGULATED INDUSTRIES FROM PRIVATE CIVIL ANTITRUST ACTIONS.

In the statute at issue in *Keogh*, Congress had not considered the potential conflict between the antitrust laws and the ICC regulatory scheme. Consequently, this Court was forced to give effect to one congressional policy while frustrating the other. The Court resolved that dilemma by granting immunity where the defendants had charged the allegedly illegal rates pursuant to duly approved tariffs. In the present situation, however, Congress has specified in section 414 of the Aviation Act, 49 U.S.C. §1384, the way in which the antitrust and regulatory laws interact. Under that provision, air carriers can secure antitrust immunity for their price-fixing agreements, but only if those agreements are approved by the CAB under section 412 of the Act, 49 U.S.C. §1382, prior to being implemented. Here, respondents' price-fixing agreement was not approved for the relevant period, and the unapproved agreement resulted in an unjustified 5% fare

increase. Because respondents did not secure antitrust immunity in the one way that the statute provides, they are liable for their antitrust violations.

If *Keogh* is read as precluding antitrust liability in this case, then a novel implied exemption from the antitrust laws will have been created, even though "exemptions from the antitrust laws are strictly construed," *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). A long line of post-*Keogh* decisions by this Court has firmly established that implied exemptions exist only when necessary to prevent a conflict between the antitrust and regulatory schemes. *See, e.g., United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357-58 (1963); *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939); *Georgia v. Pennsylvania Ry. Co.*, 342 U.S. 439, 456-57 (1944); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 385-389 (1973); *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 126 (1973); *Carnation Co. v. Pacific Conference*, 383 U.S. 213, 217-18 (1966); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975); *United States v. National Association of Securities Dealers*, 422 U.S. 694, 721-22 (1975). Here the rationale for denying respondents an implied exemption is particularly strong since Congress has addressed the issue directly in section 414, and there is nothing left for a court to imply.

The courts below erroneously focused on the question of whether the April tariff remained in effect during the relevant period. While *Keogh* did appear to be decided against the plantiff because the fares charged were contained in an approved and effective tariff, the statutory schemes vary so widely between the CAB and the ICC

that the analogy cannot be applied here. The essential difference is that in *Keogh* an effective tariff was all that was required, but under the Aviation Act, there are two distinct requirements. The carrier must, of course, have an effective tariff on file – *i.e.*, one publicly available at the CAB showing the current fares – but the carriers must also obtain prior approval of any price-fixing agreement establishing the fares charged in an effective tariff. An effective tariff is required by section 403(b), but that will certainly not create antitrust immunity for a secret price-fixing cartel or even for a public one not yet approved by the CAB. In short, section 414 creates an additional requirement beyond the one that was present in *Keogh*, but the courts below nevertheless ignored the additional requirement of CAB approval and improperly extended *Keogh* beyond its intended limits.[8]

[8] Even if the effectiveness of the tariffs were relevant to the antitrust question, the lower courts accorded undue deference to the CAB's Order concerning this question. Primary jurisdiction never permits a court to abdicate its responsibility to decide legal issues to an agency. *See Far East Conference v. United States*, 342 U.S. 570, 574 (1952); *S.S.W., Inc. v. Air Transport Association of America*, 191 F.2d 658, 664 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952). However, that is what appears to have occurred below. Such deference is particularly unwarranted here where the CAB narrowly limited the issues it addressed, refused to accept briefs, hear argument, or conduct a hearing, and simply stated its conclusion without any justification whatsoever. The CAB Order amounted to nothing more than a recitation of facts. As the Order itself stated:

> Since we shall *merely set forth the facts* with respect to the effective fares, we see no need for receiving briefs or argument from the parties. If at some further stage in this proceeding, the District Court decides that additional rulings from the Board are required, *we will furnish our opinion at that time*. [A. 24, emphasis added].

If *Keogh* is read to prevent courts from looking beyond the face of a tariff, then there can be virtually no antitrust enforcement in regulated industries where tariffs need no approval but become effective on filing. Thus, under the ruling below, it would be a simple matter to file a tariff containing an agreed-upon rate which had not been approved by the regulatory agency, and as long as the conspirators could keep that tariff on file, they would be free to charge the illegal rate. Nothing in *Keogh* permits such a result, and therefore this Court should review this unwarranted extension of the *Keogh* doctrine which creates a new, implied exemption from the antitrust laws merely by filing tariffs in the face of section 414 which specifies a very different basis for obtaining antitrust immunity.[9]

2. THE *KEOGH* DOCTRINE SHOULD NOT BE EXTENDED TO THIS CASE WHERE THE CAB AND THE AVIATION ACT HAVE PROVIDED A MEASURE OF DAMAGES.

Antitrust damages for price fixing are based upon the difference between the rates set by agreement among the conspirators and the lower rates that would have been charged in the absence of a price-fixing agreement. *See Keogh v. Chicago & N.W. Ry. Co., supra*, 260 U.S. at

[9] Respondents could have complied with both the antitrust and regulatory directives simply by not charging the higher rates set by the unapproved agreement during the relevant period, as they were perfectly free to do. Since section 403(b) of the Act requires that carriers charge fares contained in currently effective tariffs, respondents should have filed new tariffs when the approved interim agreement expired at the end of March, just as they did when the old fares expired at the end of March, and just as they did when the interim fares were specifically rejected in late July.

163-65. In situations involving regulated industries, however, the resolution of the factual question of what rates would have been charged absent an illegal agreement can be complicated because of the potential uncertainty over whether those lower rates, or any intermediate rates which could serve as a basis for damages, would have been approved by the regulatory agency as economically justifiable. Consequently, in *Keogh* this Court was forced to deny antitrust recovery to the victim of an unlawful rate-fixing agreement by eight railroad companies solely because the Court was unable to determine the proper measure of damages in the regulatory context involved in that case.

In *Keogh*, although the rates were allegedly the product of an illegal price-fixing agreement, they had, nevertheless, been carefully investigated and specifically approved by the Interstate Commerce Commission as economically justified. 260 U.S. at 160. Therefore, if this Court had permitted an award of antitrust damages there, it would have, in effect, been setting aside the rates previously approved by the ICC, – an act that this Court refused to do. This Court also found that it was unequipped to reexamine the economic conditions existing in *Keogh* in order to determine whether lower rates would have also been justified or to determine what those lower rates would have been. Therefore, it held that

> recovery cannot be had unless it is shown that, as a result of defendants' acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture.

> To make proof of such facts would be impossible in the case before us. [*Id.* at 165; footnote omitted].

The rule established by *Keogh* is a harsh one which should not be lightly invoked because it denies plaintiffs recovery for the very injury that the antitrust laws were designed to compensate and thereby allows price-fixers to retain their unlawful profits. However, *Keogh* was needlessly extended to the present case since the damages here are susceptible of precise calculation and the injustice which necessarily ensues from application of the *Keogh* doctrine can be avoided.

In the present case, the old fares serve as the basis for measuring damages. As a factual matter, there is little doubt that respondents would have charged the old fares in the absence of the price-fixing agreement since in July respondents filed tariffs reinstating the old fares once the CAB explicitly rejected their agreement.[10] Unlike the situation in *Keogh*, however, there is no uncertainty here concerning whether the CAB would have approved the old fares for the relevant period because the CAB in fact approved those fares both before and after that two and one-half month period, and because the CAB specifically ordered respondents not to implement the increase during that period – an order which would have left the old fares in effect if respondents had not chosen to ignore it.

Unlike *Keogh* where the rates charged were approved and were economically justified, the Court here is not compelled to accept the injustice that results from denying

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[10] Even if there were some dispute about this question of fact, petitioners certainly have a right to prove at trial that the old fares would have been charged.

compensation to the victims of illegal price fixing where the rates charged were administratively approved. Here the old fares provide an obvious measure of damages, and it is clear that the CAB would have allowed respondents to charge those fares during the relevant period. Consequently, the regulatory context in which respondents' price fixing occurred need not preclude recovery here as it did in *Keogh*.

CONCLUSION

The writ of certiorari should, therefore, be granted in order to review the unwarranted extension of *Keogh* and the unjustified creation of a new implied antitrust exemption resulting from the lower courts' decisions.

Respectfully submitted,

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Dated: May 3, 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARENCE M. DITLOW, individually and on behalf of all persons using transpacific air transportation since May 1, 1973,
661 South Carolina Avenue, S.E.
Washington, D.C. 20003,
Plaintiffs,

v.

CIVIL ACTION
No. 999-73

PAN AMERICAN WORLD AIRWAYS INC.
1800 K Street, N.W.
Washington, D.C. 20009,

NORTHWEST AIRLINES INC.
1660 L Street, N.W.
Washington, D.C. 20036,

TRANS WORLD AIRLINES INC.
1000 16th Street, N.W.
Washington, D.C. 20036,

AMERICAN AIRLINES INC.
1101 17th Street, N.W.
Washington, D.C. 20036,

JAPAN AIR LINES
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036,

QANTAS AIRWAYS
1712 I Street, N.W.
Washington, D.C. 20006,

CLASS ACTION

PHILIPPINE AIR LINES
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036,

CHINA AIRLINES
1725 K Street, N.W.
Washington, D.C. 20006,

BRITISH OVERSEAS AIRWAYS CORPORATION
1 Farragut Square, South
Washington, D.C. 20006, and

AIR NEW ZEALAND LIMITED
818 18th Street, N.W.
Washington, D.C. 20006,

Defendants.

COMPLAINT FOR MONETARY DAMAGES

1. This is an action brought individually and on behalf of a class of all persons who, on or since May 1, 1973, have flown between points in the United States and points in Asia/Australia/Australasia and islands in the Pacific (the "transpacific market") on any of defendant airlines. Plaintiff on behalf of himself and the class seeks damages for the unlawful charging by defendants of fares not contained in currently effective tariffs and for the charging of fares unlawfully agreed to by defendants in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

2. This Court has jurisdiction pursuant to 15 U.S.C. § 15 and 28 U.S.C. § 1337.

3. Between May 15, 1973, and May 20, 1973, plaintiff Clarence M. Ditlow made a round-trip journey from

Washington, D.C., to Tokyo, Japan, on defendant Northwest Airlines, Inc. ("Northwest"). The portion of that journey in the transpacific market was from Anchorage, Alaska, to Tokyo and from Tokyo to Seattle, Washington (the "West Coast-Tokyo journey"), for which plaintiff Ditlow was charged $875.80.

4. The defendants are airlines authorized by the Civil Aeronautics Board ("C.A.B.") to engage, *inter alia*, in the transportation of passengers in the transpacific market.

FIRST COUNT

5. During March 1973 defendants met in London, England, and agreed on fares for travel in the transpacific market to become effective on May 1, 1973 (the "London Agreement"). These fares included a 5% increase in the then effective transpacific fares, which was purported to reflect the devaluation of the dollar which occurred in February, 1973.

6. On and since May 1, 1973, defendants have implemented the London Agreement and have been demanding, collecting and receiving fares which reflect said 5% increase.

7. The London Agreement has had a substantial effect on foreign commerce in the transpacific market.

8. The London Agreement constitutes an unlawful contract, combination, and conspiracy in restraint of commerce with foreign nations and is a violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

9. Because the C.A.B. has not approved the London Agreement pursuant to Section 412 of the Federal Aviation Act, 49 U.S.C. § 1382, defendants are not entitled to the relief granted by Section 414 of the Federal Aviation Act, 49 U.S.C. § 1384, from the operation of the antitrust laws.

10. As a result of the said unlawful London Agreement, plaintiff Ditlow was charged $875.80 for the West Coast-Tokyo journey by defendant Northwest, whereas in the absence of said unlawful agreement, he would have been charged no more than $834.00.

11. Pursuant to 15 U.S.C. §15, plaintiff Ditlow is entitled to recover from defendant Northwest and the other defendants three-fold his damages of $41.80, for a total of $125.40, plus the costs of this action, including a reasonable atorney's fee.

SECOND COUNT

12. Repeats each and every allegation of paragraphs 5-9, inclusive.

13. As a result of the unlawful London Agreement, defendants have been charging and collecting from all passengers flying in the transpacific market fares which are 5% greater than the fares which defendants would have charged in the absence of that agreement.

14. Plaintiff Ditlow is a member of a class consisting of all persons who, on or since May 1, 1973, have flown in the transpacific market on any of defendant airlines and who have been charged fares pursuant to the London Agreement.

15. The members of the class are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class which predominate over questions of law and fact involving only individual members; the claims of plaintiff Ditlow are typical of the claims of the members of the class; plaintiff Ditlow will fairly and adequately protect the interests of the class; and a class action is superior to other available

methods for fair and efficient adjudication of the controversy between members of the class and defendants.

16. As a result of the unlawful London Agreement, each member of the class has been damaged in an amount equal to approximately 5% of the fare which he was charged for his transpacific flight, with the total amount of damages to the class being approximately $1,700,000.

17. Defendants are jointly and severally liable for the damages each member of the class has sustained.

18. Pursuant to 15 U.S.C. § 15, each member of the class is entitled to recover from the defendants threefold his damages, for a total estimated recovery of $5,100,000, plus the costs of this action, including a reasonable attorney's fee.

THIRD COUNT

19. Section 403(b) of the Federal Aviation Act, 49 U.S.C. § 1373(b), provides in relevant part: "No air carrier or foreign air carrier shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares and charges specified in its currently effective tariffs . . ."

20. As of May 1, 1973, defendants, who are either air carriers or foreign air carriers within the meaning of 49 U.S.C. § 1373(b), have had no currently effective tariffs for travel in the transpacific market.

21. The last non-interim tariff which defendants filed with the C.A.B. for transpacific flights expired on March 31, 1973.

22. For the period from April 1, 1973, to April 30, 1973, inclusive, defendants had on file with the C.A.B.

tariffs which were 5% greater than the tariffs described in paragraph 21.

23. For his round-trip West Coast-Tokyo journey, plaintiff Ditlow was charged by, and paid to, defendant Northwest $875.80, which is the amount of the tariff which was effective only for the month of April and which is $41.80 greater than the tariff in effect prior to said temporary April tariff.

24. Said fare of $875.80 was unlawfully charged and collected by defendant Northwest because such fare was not contained in a tariff effective at the time it was charged and collected.

25. As a result of Northwest's charging an amount in excess of that reflected in a currently effective tariff, Northwest was in violation of Section 403(b), and plaintiff Ditlow is entitled to recover $41.80 from defendant Northwest.

FOURTH COUNT

26. Repeats each and every allegation of paragraphs 19-22, inclusive.

27. Commencing on May 1, 1973, all of the defendants have been charging passengers in the transpacific market 5% more for fares than they charged in the tariff referred to in paragraph 21.

28. Plaintiff Ditlow is a member of a class consisting of all persons who, on or since May 1, 1973, have flown in the transpacific market on any of defendant airlines and who have been charged an amount greater than that reflected in the tariff referred to in paragraph 21.

29. The members of the class are so numerous that joinder of all members is impracticable; there are questions

of law and fact common to the class which predominate over questions of law and fact involving only individual members; the claims of the plaintiff Ditlow are typical of the claims of the members of the class; plaintiff Ditlow will fairly and adequately protect the interests of the class; and a class action is superior to other available methods for fair and efficient adjudication of the controversy between members of the class and defendants.

30. As a result of defendants' unlawfully charging fares in violation of Section 403(b), each member of the class is entitled to recover from the defendant airline on which he or she flew an amount equal to the 5% difference between the fare charged and paid and the last non-temporary transpacific tariff which defendants had filed with the C.A.B., with the total amount of damages to the class being approximately $1,700,000.

WHEREFORE, plaintiffs pray for:

1. a judgment for plaintiff Ditlow on count one in the amount of $125.40 plus costs of this action and a reasonable attorney's fee; or if that relief is denied, a judgment in the amount of $41.80 on count three;

2. a judgment on count two against the defendants jointly and severally in favor of each member of the plaintiff class for threefold the damages each member of the class sustained as a result of the defendants' unlawful London Agreement for a total of approximately $5,100,000 plus costs of bringing this action and a reasonable attorney's fee; or if that relief is denied, a judgment in favor of each member of the plaintiff class on count four against the defendant airline on which he or she flew in the transpacific market for the amount by which what said member paid exceeds the amount of the fare effec-

tive in the tariff which expired on March 31, 1973, for a total of approximately $1,700,000;

3. an order granting plaintiffs such other and further relief as may be just and proper; and

4. an order awarding plaintiffs their costs and disbursements in this action.

Dated: Washington, D.C.
May 22, 1973

/s/ Alan B. Morrison
Alan B. Morrison

/s/ Raymond T. Bonner
Raymond T. Bonner

Attorneys for Plaintiffs

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[August 7, 1973]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARENCE M. DITLOW, et al., *Plaintiffs,*	)	
v.	)	**Civil Action No. 999-73**
PAN AMERICAN WORLD AIRWAYS, INC., et al.,	)	
Defendants.	)	

ORDER GRANTING MOTION TO DISMISS
AND DENYING MOTION TO REQUIRE
THE PRESERVATION OF DOCUMENTS

Upon consideration of the motion of all defendants to dismiss the complaint herein for failure to state a claim upon which relief can be granted, and the memorandum in support thereof and points and authorities in opposition thereto, and, upon consideration of the motion of plaintiff for an order requiring the preservation of documents, the points and authorities in support thereof, and it appearing to the Court that the complaint fails to state a claim upon which relief can be granted for violation of the Sherman Antitrust Act, it is by the Court this 7th day of August, 1973,

ORDERED:

1. That the motion of the defendants to dismiss be and the same hereby is granted and the complaint herein dismissed.

2. That the motion of plaintiff for an order requiring the preservation of documents be and hereby is denied.

/s/ Joseph C. Waddy
JUDGE

[September 19, 1974]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1936 September Term, 1974
Civil 999-73

CLARENCE M. DITLOW, et al.,
Appellants

v.

PAN AMERICAN WORLD AIRWAYS, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Wright, Tamm and Wilkey, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel.

It appearing to the Court that the first critical, and perhaps dispositive, issue in the case is: What fares over the Pacific, those ceasing 31 March 1973 or those to be effective through 30 April 1973, if any, were in effect during May 1973? And it further appearing to the Court that this is an issue which should be decided in the first instance

by the Civil Aeronautics Board, *Israel v. Baxter Laboratories, Inc.*, 151 U.S. App. D.C. 101, 109-12, 466 F.2d 272, 280-83 (1972), it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court is vacated and the case is remanded with instructions to retain jurisdiction while directing the parties to take appropriate action before the Civil Aeronautics Board to determine the answer to the above and related questions, and thereafter to determine such remaining issues as it may deem necessary for a complete decision in the cause.

Per Curiam
For the Court

/s/ Hugh E. Kline
Hugh E. Kline
Clerk

[April 25, 1975]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARENCE M. DITLOW, et al., *Plaintiffs,*
v.
PAN AMERICAN WORLD AIRWAYS, INC., et al., *Defendants.*

Civil Action No. 999-73

ORDER

It appearing to the Court that defendants herein have filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and that the record herein contains matters outside the pleadings which have been presented to the Court, and that these matters have not been excluded by the Court, and it further appearing that Rule 12(b) provides that when

> "on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56,"

and it appearing to the Court therefrom that the present motion of defendants to dismiss should be treated as a motion for summary judgment, and that all parties should be given the opportunity to present all material made pertinent to such a motion by Rule 56, it is by the Court, *sua sponte,* this 25th day of April, 1975,

ORDERED, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, that the motion of defendants to dismiss be, and the same hereby is, treated by the Court as a motion for summary judgment; it is further

ORDERED, that the parties shall have until May 9, 1975, to present all material made pertinent to a motion for summary judgment by Rule 56 of the Federal Rules of Civil Procedure.

/s/ Joseph C. Waddy
Joseph C. Waddy
United States District Judge

STIPULATION OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

On April 25, 1975, the Court entered an Order providing that defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, filed July 13, 1973, as supplemented by defendants' motion filed April 2, 1975, would be treated by the Court as a motion for summary judgment, and pro-

viding further that the parties might present to the Court material made pertinent to a motion for summary judgment by Rule 56 of the Federal Rules of Civil Procedure. Pursuant to the Court's April 25 Order and Rule 1-9(g) of the Rules of the United States District Court for the District of Columbia, the parties hereby stipulate the following material facts as to which there is no genuine issue. This stipulation has been agreed to for purposes of the present motion only. The exhibits referred to in this stipulation are attached hereto and incorporated herein.

1. At all times pertinent to the complaint in this action, defendants (hereinafter "the carriers") were members of the International Air Transport Association (hereinafter "IATA"). One of IATA's principal functions has been and continues to be, to provide a mechanism for ratemaking by agreement in international air transportation. The IATA rate conference machinery was approved by the Civil Aeronautics Board (hereinafter "CAB") by order adopted February 19, 1946 (6 C.A.B. 639 (1946)). (Exh. A). By Order E-9305, adopted June 15, 1955 (Exh. B), however, the CAB required that each IATA rate agreement be specifically approved by the CAB prior to its implementation.

2. By Order 72-3-105 (Exh. C), adopted March 30, 1972, the CAB approved an IATA agreement covering transpacific passenger fares. By its terms, the agreement covered by Order 72-3-105 became effective April 1, 1972, and was to expire on March 31, 1973. Tariffs were filed on behalf of the carriers with the CAB in early March, 1972, for effectiveness April 1, 1972, implementing this agreement. From April 1, 1972 through March 31, 1973, these tariffs set forth the effective fares in the transpacific market. In accordance with the CAB's normal practice at that time for the approval of such agreements, Order 72-3-105 did not direct that the tariffs contain expiry dates, and no expiry dates were included in the tariffs.

3. In March 1973, IATA meetings were held in London for the purpose of reaching agreement on the fares to be charged in the transpacific market following the expiration of the then current agreement. At the London meetings, the carriers adopted three interim agreements to take effect April 1, 1973, and to expire on April 30, 1973. In addition, three permanent agreements were adopted to take effect May 1, 1973, upon expiration of the interim agreements, and to continue in effect until the specific expiry date contained in each of the permanent agreements.

4. The interim agreements were designated IATA Agreements 23594, 23598 and 23605. (Exh. D). Agreements 23594 and 23598 readopted the fares which were in effect from April 1, 1972 through March 31, 1973. Agreement 23605 contained a 5 percent increase over those fares, which the carriers stated was necessary to avoid revenue losses due to fluctuations in the values of international currencies. The 5 percent increase applied to fares for westbound transpacific travel originating in the United States, and fares for eastbound transpacific travel originating in certain foreign countries.*

5. The permanent agreements adopted at the London IATA meetings were designated IATA Agreements 23596, 23600, and 23608. Agreements 23596 and 23600 proposed a number of changes in the transpacific fare structure, the net effect of which was to increase the base fares in the transpacific market as a whole by approximately 4 percent. Agreement 23608 contained a 5 percent fare increase designed to compensate for international currency

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* Bangladesh, Cambodia, Fiji, India, Indonesia, Korea, Laos, Nepal, Philippines, Thailand and Vietnam.

fluctuations. For the transpacific market, Agreement 23608 proposed on a more permanet basis the same 5 percent fare adjustment contained in interim Agreement 23605.

6. On March 29, 1973, the carriers filed the interim agreements and the three permanent agreements with the CAB for approval pursuant to section 412 of the Federal Aviation Act, 49 U.S.C. §1382.

7. Beginning at least as early as March 26, 1973, tariffs implementing the 5 percent fare increase set forth in the interim agreements were filed with the CAB on behalf of the carriers, for effectiveness April 1, 1973. These tariffs did not contain expiry dates.

8. The CAB did not require the carriers to submit economic justifications for the higher fares prior to approval and implementation of the interim agreements. Defendants Pan American World Airways and Trans World Airlines filed statements in support of the 5 percent increase in the interim agreements. By Orders 73-3-132 (Exh. E) and 73-3-137 (Exh. F), both adopted March 30, 1973, the CAB approved the interim agreements which contained April 30, 1973, expiry dates, but did not require that any expiry date be included in the tariffs filed to implement the interim agreements.

9. On April 1, 1973, the carriers began charging fares for transpacific travel in accordance with the tariffs which had been filed for effectiveness April 1, 1973, to implement the interim agreements.

10. The CAB did not immediately rule upon the permanent agreements, but on April 12, 1973, issued Order 73-4-60 (Exh. G) directing all United States IATA carriers to file economic justifications in support of the permanent agreements within 10 days of the date of that order. The order provided that "tariffs implementing the subject agreements shall not be filed in advance of Board approval of the subject agreements." (Order 73-4-60, p. 3). The order also provided that interested parties could file replies to justifications within 10 days after filing of the justifications. Justifications and replies thereto were filed.

11. Between May 15, 1973, and May 20, 1973, plaintiff made a round-trip journey from Washington, D.C., to Tokyo, Japan, on board scheduled flights of defendant Northwest Airlines. The fare charged for that portion of plaintiff's journey which was in the transpacific market was $875.80. That fare was identical to the fare contained in the transpacific tariff which was originally filed to implement the interim agreements on behalf of defendant Northwest Airlines and was $41.80 higher than the fare that was in effect for the same journey prior to April 1, 1973, and after July 18, 1973.

12. On July 12, 1973, the CAB issued two orders with respect to the permanent IATA agreements for the transpacific market. The North/Central and South Pacific areas were treated separately. By Order 73-7-55 (Exh. H), the CAB approved Agreement 23596, containing a net increase of approximately 4 percent for the South Pacific market, and Agreement 23608, insofar as it provided for a 5 percent currency fluctuation increase in the South Pacific. With regard to the fares proposed for the North/Central Pacific, Order 73-7-54 (Exh. I) withheld approval of the net increase of the approximately 4 percent in the base fares and of the 5 percent currency fluctuation increase in the North/Central transpacific market. This order provided that "[t]ariff revisions necessary to reflect disapproval of the currency adjustment . . . shall be implemented on not less than one day's notice within five days from the date of this order; . . . ." (Order 73-7-54, p. 14).

13. In Orders 73-7-54 and 73-7-55, the CAB directed that tariffs filed in implementation of the IATA agreements which were approved by those orders were to be marked to expire as of certain dates. Although the Board's practice varied, prior to initiation of this case it was not standard procedure under these circumstances for the Board to include in its orders a requirement that tariffs contain specific expiry dates.

14. Pursuant to Order 73-7-54, the carriers filed new tariffs for both the North/Central and the South portions of the transpacific market. For the North/Central transpacific market, these tariffs were filed on July 18, 1973, to be effective the following day for defendants American Airlines, China Airlines, Japan Air Lines, Philippine Air Lines, Northwest Airlines, and Trans World Airlines; and on July 23, 1973, for effectiveness the following day for defendants Air New Zealand, British Airways, Pan American World Airways and Qantas Airways. These new tariffs set forth fares which were identical to the fares that had been in effect prior to April 1, 1973. For the South transpacific market, tariffs containing the fare increases in the permanent agreements were not filed until late August 1973, for effectiveness September 1, 1973. The Board ordered the delay in filing because of its uncertainty concerning the effect of the wage-price freeze on its authority to allow such increases.

15. From May 1, 1973, until September 1, 1973, with respect to the South Pacific, and from May 1, 1973, until July 19 or July 24, 1973, for the North/Central Pacific, as set forth in paragraph 14 above (the "relevant period"), the carriers charged fares for transpacific travel which included the 5 percent currency fluctuation adjustment contained in the interim agreements, permanent

Agreement 23608, and the tariffs which were filed to implement the interim agreements.

16. At no time did the CAB issue an order purporting to suspend the transpacific tariffs which became effective April 1, 1973, pursuant to section 1002(j)(1) of the Federal Aviation Act, 49 U.S.C. §1482(j)(1).

17. On August 7, 1973, the Court dismissed this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the complaint failed to state a claim upon which relief could be granted.

18. On September 19, 1974, the United States Court of Appeals for the District of Columbia Circuit entered its judgment vacating this Court's judgment dismissing the complaint, and remanding the case "with instructions to retain jurisdiction while directing the parties to take appropriate action" before the CAB with respect to what the Court of Appeals stated was the "first critical, and perhaps dispositive issue" in the case: "What fares over the Pacific, those ceasing 31 March 1973 or those to be effective through 30 April 1973, if any, were in effect during May 1973?"

19. On November 8, 1974, this Court issued an Order, in accordance with the judgment of the Court of Appeals, directing the parties to take "appropriate action" before the Board with respect to the above and related issues.

20. Following the remand by the Court of Appeals and this Court's November 8 Order, the parties presented to the CAB for its determination the issue as framed by the Court of Appeals and other questions raised by plaintiffs' complaint.

21. Plaintiff Ditlow filed a Petition For a Declaratory Order on November 26, requesting the CAB's opinion as to what fares should have been charged, what tariffs were in effect, and whether defendants had complied with section 403(b) of the Federal Aviation Act, during the relevant period. In addition, plaintiff Ditlow asked the Board to decide whether any agreement authorizing a 5 percent fare increase during the relevant period had been approved under section 412 of the Act. (Exh. J).

22. In their answer to the Petition, filed on December 6, 1974, defendants requested that the CAB consider only the question of what tariffs and fares were effective in the market during the relevant period, on the grounds that the Court of Appeals had stated that the issue might be dispositive and the other questions posed by the plaintiff were beyond the scope of the remand order. (Exh. K). Defendants also moved this Court to issue an order which would similarly limit the questions to be considered by the CAB. (Exh. L).

23. Plaintiffs filed an opposition to defendants' motion, stating that all arguably relevant issues should be considered by the CAB so that the Court could be fully apprised of the CAB's views. (Exh. M).

24. This Court denied defendants' motion, stating that the CAB was in a better position to determine whether the questions posed by plaintiffs were related to the main question and that it was unnecessary for the Court to supplement its earlier order. On December 20, 1974, defendants filed with the CAB a supplemental answer to the Petition For A Declaratory Order, advising of the Court's action and requesting that the questions be limited as indicated above. (Exh. N). Plaintiff Ditlow opposed on the same grounds asserted before the Court. (Exh. O).

25. On March 10, 1975, in response to plaintiffs' petition, the CAB issued Order 75-3-16 (Exh. P), in which it states that the interim fares which became effective April 1, 1973, remained effective throughout May 1973 and throughout the entire period in issue in this case.

26. Plaintiffs contend that the fares charged during the relevant period were set by and charged pursuant to an unapproved agreement. Defendants' motion was filed pursuant to Rule 12(b)(6) under which the facts as alleged are assumed to be true. The Court has now ordered that defendants' Rule 12(b)(6) motion will be treated as a motion for summary judgment. For the sole purpose of enabling the Court to determine the legal sufficiency of plaintiffs' Complaint, defendants are willing to have the truth of plaintiffs' contention assumed against them. Plaintiffs do not seek summary judgment against defendants on the basis of this assumption. If defendants' motion is denied, defendants are entitled to pursue all other defenses or procedures available to them, including a determination on the merits concerning the existence or implementation of an agreement after April 30, 1973.

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Attorney for Defendants

Dated: May 9, 1973

Order 75-3-16

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 6th day of March, 1975

In the Matter of TRANSPACIFIC PASSENGER FARES of the IATA carriers from May 1, 1973, through July 18, 1973	Docket 27201

DECLARATORY ORDER

On November 26, 1974, Clarence M. Ditlow (petitioner) filed a document entitled "Petition for Declaratory Order," requesting that the Board give its opinion regarding six questions relating to the passenger-fare tariffs of certain International Air Transport Association (IATA) member air carriers[1] operating in the transpacific market during the period May 1, 1973, through July 18, 1973. Petitioner stated that the Board's opinion was requested pursuant to an order of the United States District Court for the District of Columbia, in *Ditlow et. al.*, v. *Pan American World*

[1] Air New Zealand Limited (Air New Zealand), American Airlines, Inc. (American), British Airways (British), China Airlines (China), Japan Air Lines (Japan), Northwest Airlines, Inc. (Northwest), Pan American World Airways, Inc. (Pan American), Philippine Air Lines (Philippine), Qantas Airways (Qantas), and Trans World Airlines, Inc. (TWA), (hereinafter referred to as transpacific carriers).

Airways, Inc. et. al., D.D.C. Civil Action No. 999-73, an action for damages brought by petitioner against the transpacific air carriers. Petitioner further requested that the Board make its determination directly on briefs submitted by the parties.

An answer and supplemental answer have been filed by the transpacific air carriers, in which it is requested that the Board strike certain of the questions posed in the petition, on the grounds that they are not appropriate for determination by the Board in this proceeding. Petitioner has filed a reply in the form of an objection to the transpacific carriers' request to strike certain questions.

The Court of Appeals for the District of Columbia Circuit (No. 73-1936), on September 19, 1973, entered a judgment in the *Ditlow* case remanding the case to the District Court. The Court of Appeals stated "that the first critical, and perhaps dispositive, issue in the case is: What fares over the Pacific, those ceasing 31 March 1973 or those to be effective through 30 April 1973, if any, were in effect during May, 1973?" The Court further stated that "this is an issue which should be decided in the first instance by the Civil Aeronautics Board." The Court ordered the District Court to retain jurisdiction while directing the parties to take the appropriate action before the Board "to determine the answer to the above and related questions." On November 8, 1974, the District Court issued an order implementing the directives of the judgment of the Court of Appeals.

On December 6, 1974, the transpacific carriers filed a motion in the District Court for an order supplementing the Court's November 8 order, requesting that the Court delineate for the parties the scope of the issues to be presented to the Board in this proceeding. On December 13, 1974, the District Court denied this motion, stating that "The

Civil Aeronautics Board is in a better position to determine whether the questions posed by the plaintiff are related to the main question and that, therefore, it is unnecessary for the Court to supplement its order."

The Board has determined at this time to answer only the one specific question posed by the Court of Appeals and incorporated into the order of the District Court. This issue is as follows:

> What fares over the Pacific, those ceasing 31 March 1973 or those to be effective through 30 April, 1973, if any, were in effect during May, 1973?

We have made this determination because the Court of Appeals has noted that this question was "critical" and "perhaps dispositive" of the case. Thus, the other questions posed by petitioner may prove to be unnecessary. Since we shall merely set forth the facts with respect to the effective fares, we see no need for receiving briefs or argument from the parties. If at some further stage in this proceeding, the District Court decides that additional rulings from the Board are required, we will furnish our opinion at that time. Our decision to answer the one question posed by the Court makes it unnecessary to comment on the answers of the transpacific carriers or petitioner's reply thereto.

The Board finds that, during May 1973, the fares in effect over the Pacific were those that were effective through April 30, 1973.

With respect to the transpacific fares at issue here, there are three distinct time periods: (1) those fares in effect from April, 1972, until March 31, 1973; (2) those fares

in effect from April 1, 1973, until late July 1973;[2] and (3) those fares in effect on and after late July 1973.

With respect to the first time period, by Order 72-3-105, dated March 30, 1972, the Board approved, under Section 412 of the Act, a series of agreements embodied in IATA rsolutions relating to, among other things, passenger fares for the North/Central Pacific and South Pacific areas. The fares embodied in these agreements were to be effective from April 1, 1972 until March 31, 1973, and tariffs embodying these fares were filed with the Board.[3]

In March 1973, the IATA carriers met in London, England, for the purpose of reaching agreement on fares to follow the effectiveness of the above-mentioned agreement, which was to expire on March 31, 1973. A series of resolutions were adopted at that time, including three interim agreements (Agreements CAB 23594, 23598, and 23605) which were to be in effect from April 1, 1973, through April 30, 1973; and three agreements (Agreements

[2] Specifically, July 19, 1973, or July 24, 1973, depending upon the carrier.

[3] For the transpacific carriers involved in this proceeding, the following are the tariffs in question:

American, China, Japan, Northwest, Philippine, and Pan American (on and after September 1, 1974) - Air Tariff Corp., Agent, Passenger Fares Tariff No. PF-4, CTC(A) No. 34, CAB No. 44.

Pan American (prior to September 1, 1974) - International Air Traffic Tariffs Corp., Agent, Local and Joint Passenger Fares Tariff No. P-AP-11, CAB No. 411.

Air New Zealand, British, and Qantas - John M. Sampson, Agent, Passenger Fares Tariff No. 3, CTC(A) No. 13, CAB No. 15.

TWA - Trans World Airlines, Inc., International Local and Joint Passenger Fares Tariff No. F-10, CAB No. 208.

CAB 23596, 23600, and 23608) which were to become effective May 1, 1973.

In late March 1973, the three interim agreements (CAB 23594, 23598,and 23605) were filed with the Board, pursuant to Section 412 of the Act and Part 261 of the Board's Economic Regulations. Agreements 23594 and 23598 readopted the fares which were then in effect and covered by the agreements expiring March 31, 1973, for the South Pacific and North/Central Pacific areas, respectively. Agreement 23605 was a result of the devaluation of the U.S. dollar on February 12, 1973, and contained certain currency adjustments intended to maintain an appropriate equilibrium among currencies whose relative values, one to another, had fluctuated, and to avoid carrier revenue loss due to such fluctuations. The net effect of these three interim agreements was to increase transpacific passenger fares for westbound-originating travel, and for eastbound travel originating in certain Asian countries, by 5 percent for the month of April 1973.

By Orders 73-3-132 and 73-3-137, dated March 30, 1973, the Board approved the three interim agreements. Although the Board noted in the text of the orders that the agreements provided that the new fares established pursuant thereto would be effective through April 30, 1973, the ordering paragraphs did not require that the tariffs implementing the agreement contain a specific expiration date. The transpacific carriers filed tariffs containing the 5 percent fare increase effective April 1, 1973; and these tariffs contained no expiration date. The Board did not suspend these tariffs pursuant to section 1002(j) of the Act after April 30, 1973, pending its consideration of Agreements 23596, 23600, and 23608, nor did the carriers revise the tariffs pursuant

to Section 403 of the Act.[4] Thus, these tariffs remained in effect until new tariffs were filed with the Board and became effective, in late July 1973, pursuant to Order 73-7-54, discussed subsequently. Therefore, during the second relevant time period, from April 1, 1973, until late July 1973, these were the fares reflected in the currently effective tariffs of the air carriers in question.

As noted previously, Agreements CAB 23596, 23600, and 23608 were also filed with the Board in late March 1973. Agreements 23596 and 23600 contained certain modifications in the fare structure of the South Pacific and North/Central Pacific areas, respectively. Agreement CAB 23608 contained the 5 percent fare increase for the transpacific area to offset devaluation of the dollar, identical to the provision in the previous interim agreement. By Order 73-4-60, dated April 12, 1973, the Board directed the U.S. carrier members of IATA to submit full documentation and economic justification for the change in the fares embodied in the agreements within 10 days, and permitted replies to be filed 10 days thereafter. On July 12, 1973, by Order 73-7-54, the Board found that the 5 percent fare increase was not economically justified for the North/Central Pacific areas, disapproved those portions of the agreements relating to this area,[5] and ordered the carriers to revise tariffs to reflect this finding.

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[4] Under Section 403(c) of the Act, tariffs must be filed on 30 days' notice unless the Board permits or orders lesser notice.

[5] By Order 73-7-55, dated July 12, 1973, and issued simultaneously with the above-mentioned order, the Board approved the IATA agreement containing a 5 percent fare increase for the South Pacific.

Pursuant to this order, the transpacific carriers filed new tariffs for the North/Central portion of the transpacific market. These tariffs were filed on July 18, 1973, to be effective the following day for American, China, Japan, Philippine, Northwest, and TWA; and on July 23, 1973, for effectiveness the following day for Air New Zealand, British, Pan American, and Quantas. These tariffs reflected the fares that had been in effect prior to April 1973. Thus, during the third relevant time period, on and after July 19, 1973 (or on and after July 24, 1973), the fares that were in effect were those which had been in effect during the first relevant time period, from April 1, 1972, until March 31, 1973.

Accordingly, we find that, during May 1973, the fares in effect over the Pacific were those that were effective through April 30, 1973.

IT IS ORDERED THAT:

1. The petition of Clarence M. Ditlow is granted to the extent set forth herein, and is otherwise denied; and

2. This order will be served upon counsel for Clarence M. Ditlow and for the carriers listed in footnote 1.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Acting Secretary

(SEAL)

[filed May 29, 1975]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARENCE M. DITLOW, et al., *Plaintiffs*	)	
v.	)	**Civil Action No. 999-73**
PAN AMERICAN WORLD AIRWAYS, INC., et al., *Defendants.*	)	

ORDER GRANTING SUMMARY JUDGMENT
FOR DEFENDANTS

Upon consideration of defendants' supplemental motion to dismiss the complaint, treated by the Court as a motion for summary judgment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, plaintiffs' motion for partial summary judgment on Count Three of the complaint, the memoranda of points and authorities in support thereof, and in opposition thereto, the stipulation of material facts as to which there is no genuine issue and the exhibits attached thereto, the complaint, the opinion of the Court of Appeals filed herein on October 30, 1974, the Declaratory Order of the Civil Aeronautics Board (CAB) adopted by the Board on March 6, 1975, and the entire file herein, and it appearing that the CAB has determined that during the period May 1, 1973 through July 18, 1973, the fares in effect over the Pacific were those that were effective through April 30, 1973, and it being the opinion of the Court that by charging fares contained in currently effec[illegible] tariffs defendants

are immune from the operation of the antitrust laws pursuant to 49 U.S.C. §1384, and there can be no violation of 49 U.S.C. §1373(b); and the Court further being of the opinion that there can be no violation of plaintiffs' legal rights by defendants in respect to rates made pursuant to valid and effective tariffs, *see Keogh v. Chicago and N.W. Ry. Co.*, 260 U.S. 156, 163 (1922); *Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360, 365 (S.D. Fla. 1972), *aff'd* 477 F.2d 564 (CA5, 1973), and cases cited therein; and the Court having concluded that there exists no genuine issue of material fact and that defendants are entitled to judgment as a matter of law, it is by the Court this 29th day of May, 1975,

ORDERED, that plaintiffs' motion for summary judgment on Count Three of the complaint be, and the same hereby is, denied; it is further

ORDERED, that defendants' motion to dismiss the complaint, treated by the Court as a motion for summary judgment, be, and the same hereby is, granted and this case dismissed.

/s/ Joseph C. Waddy
Judge

[filed January 6, 1976]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1661 — September Term, 1975
Civil Action 999-73

Clarence M. Ditlow, individually and on behalf of all persons using transpacific air transportation since May 1, 1973,

Appellants

v.

Pan American World Airways, Inc., et al.

BEFORE: Wright and Robb, Circuit Judges

ORDER

On consideration of appellees' motion for summary affirmance, and of appellants' opposition thereto, it is

ORDERED by the Court that appellees' aforesaid motion is granted and the order of the District Court appealed from herein be, and the same hereby is, affirmed.

Per Curiam

[filed February 3, 1976]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1661 September Term, 1975
Civil Action 999-73

Clarence M. Ditlow, individually and
on behalf of all persons using
transpacific air transportation since
May 1, 1975,

Appellants

v.

Pan American World Airways, Inc.
et al.

Before: Wright and Robb, Circuit Judges

ORDER

On consideration of appellants' petition for rehearing, it is

ORDERED by the Court that appellants' aforesaid petition for rehearing is denied.

Per Curiam
For the Court:
Robert A. Bonner, Clerk

By: Daniel M. Cathey
Chief Deputy Clerk

Supreme Court, U. S.
FILED
MAY 28 1976

No. 75-1603

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

CLARENCE M. DITLOW, *et al.*,
Petitioners,

v.

PAN AMERICAN WORLD AIRWAYS, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., AMERICAN AIRLINES, INC., JAPAN AIRLINES, QANTAS AIRWAYS, PHILIPPINE AIR LINES, CHINA AIRLINES, BRITISH AIRWAYS, AND AIR NEW ZEALAND, LIMITED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

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TABLE OF CONTENTS

	Page
Question Presented	1
Statement of the Case	2
Proceedings Below	4
Reasons for Denying the Writ	5
A. This Case Arose Out Of A Situation Which Is Not Likely To Recur, And A Decision By This Court Would Be Of Little Or No Precedential Value	5
B. Since The Fare Charged Petitioner Was Set Forth In Effective Tariffs On File With The CAB, This Action Is Barred By The *Keogh* Doctrine	6
C. The Events In Question Were Under The Continuing Supervision Of The CAB, Thus Preempting The Operation Of The Antitrust Laws	9
Conclusion	11

CITATIONS

CASES: Page

Georgia v. *Pennsylvania Ry. Co.*, 324 U.S. 439 ... 7, 8
Hanover Shoe Co. v. *United Shoe Mach. Corp.*, 392 U.S. 481 ... 8
Hughes Tool Co. v. *Trans World Airlines, Inc.*, 409 U.S. 363 ... 9, 10
Keogh v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156 ... 6, 7, 8, 9, 10
Lamb Enterprises, Inc. v. *Toledo Blade Co.*, 461 F.2d 506 (6th Cir. 1972), *cert. denied*, 409 U.S. 1001 ... 8
Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 ... 9
S.S.W., Inc. v. *Air Transport Ass'n of America*, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 ... 8

STATUTES:

Federal Aviation Act:

Section 403(b), 49 U.S.C. § 1373(b) ... 4, 6
Section 412, 49 U.S.C. § 1382 ... 3, 9
Section 414, 49 U.S.C. § 1384 ... 10

Sherman Act, 15 U.S.C. § 1 ... 1, 4

MISCELLANEOUS:

Federal Rules of Civil Procedure:

Rule 23 ... 4
Rule 56 ... 5

IATA Traffic Conference Resolution, 6 CAB 639 (1946) ... 2

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether an action for damages under section 1 of the Sherman Act, 15 U.S.C. § 1, alleging an unlawful agreement by air carriers in the setting of fares, can be maintained where (a) the fares in question were set forth in, and charged pursuant to, effective tariffs law-

fully on file with the Civil Aeronautics Board, and (b) where the activities in issue were under the continuing regulatory control and supervision of the CAB.

STATEMENT OF THE CASE

During the relevant period, the respondent air carriers (hereinafter "the carriers") were members of the International Air Transport Association (hereinafter "IATA").[1] One of IATA's principal functions is to provide a stable mechanism for ratemaking in international air transportation. The IATA ratemaking machinery has been approved by the CAB since 1946. *See IATA Traffic Conference Resolution*, 6 CAB 639 (1946).

In March 1973, the carriers attended an IATA meeting in London for the purpose of negotiations with respect to the fares to be charged in the transpacific market following the expiration of the then current agreement, which was to expire on March 31, 1973. For reasons not pertinent here, the carriers adopted "interim" fare agreements to take effect April 1, 1973, and to expire on April 30, 1973, and "permanent" agreements to take effect May 1, 1973, and to continue in effect for approximately a year.

The interim agreements increased the then existing fares by 5 percent in order to avoid revenue losses due to fluctuations in the values of international currencies. The permanent agreements contained a number of changes in the transpacific fare structure, the net effect of which was to increase the base fares in the transpacific market by approximately 4 percent, and, in addition, a 5-percent currency fluctuation increase.

[1] The facts stated herein are taken from the parties' joint stipulation of facts (Pet. App., pp. 13-21).

On March 29, 1973, as required by section 412 of the Federal Aviation Act, 49 U.S.C. § 1382, the carriers filed both the interim agrements and the permanent agreements with the CAB for approval. The carriers also filed tariffs with the CAB, for effectiveness on April 1, setting forth the 5-percent fare increase resulting from the interim agreements. These tariffs were not required to, and did not, contain expiration dates.

On March 30, 1973, the CAB approved the interim agreements. On April 1, 1973, the carriers began charging fares for transpacific travel in accordance with the new tariffs.

The CAB did not act on the permanent agreements by May 1, 1973, the date when they were to have become effective, and, in fact, did not act until mid-July. The delay was due to the fact that the CAB directed the carriers to file economic justifications for the agreements and permitted interested parties to file comments.

Thus, as of May 1, there was no effective IATA agreement on transpacific fares, and the carriers, awaiting CAB action, had the choice of leaving the existing tariffs in effect or of filing new tariffs containing different fares. No carrier filed a new tariff, with the result that each carrier's then current tariff (*i.e.*, the tariffs which became effective April 1) remained in effect during the period in issue in this case. Although empowered to do so, the CAB took no action to suspend those tariffs during the period in issue, or to require the carriers to file new tariffs.

On July 12, 1973, the CAB finally acted on the permanent agreements. It approved the proposed fare increases for the South Pacific, but withheld approval with respect to the North/Central Pacific. The carriers then filed new tariffs reflecting the CAB's decision.

During the post-May 1 period in issue in this case, the carriers charged fares for transpacific travel in accordance with the tariffs which became effective on April 1.

PROCEEDINGS BELOW

The complaint (Pet. App., p. 1) alleges (1) that on and after May 1, 1973, the carriers implemented an unlawful agreement to set fares in the transpacific market in violation of section 1 of the Sherman Act, and (2) that on and after May 1, 1973, the carriers charged fares for travel in the transpacific market in excess of the fares contained in then currently effective tariffs, in violation of section 403(b) of the Federal Aviation Act, 49 U.S.C. § 1373(b). The only relief sought by the complaint is damages, measured by the 5-percent difference between the pre-April 1 fares and the fares which were charged during the period in issue.[2]

Pursuant to the carriers' motion, the district court, on August 7, 1973, dismissed the complaint for failure to state a claim upon which relief could be granted (Pet. App., p. 9).

The petitioner appealed. The case was fully briefed, and was argued before the United States Court of Appeals for the District of Columbia Circuit. On September 19, 1974, the court of appeals entered a judgment vacating the dismissal and remanding the case to the district court with instructions to retain jurisdiction and direct the parties to seek the determination of the CAB with respect to what the court stated was the "first critical, and perhaps dispositive issue" in the case: "What fares over the Pacific, those ceasing 31 March 1973 or those to be effective through 30 April, 1973, if

[2] Although this action is styled as a class action, petitioner did not file a motion in the district court for certification of a class action under Rule 23 of the Federal Rules of Civil Procedure.

any, were in effect during May 1973?" (Pet. App., p. 10).

Following the remand, the parties filed pleadings with the CAB, and requested that it issue a declaratory order. By order dated March 6, 1975, the CAB held that the fares which became effective on April 1, 1973, remained effective throughout May 1973, and throughout the entire period in issue in this case (Pet. App., p. 22).

On the basis of the CAB's determination of the critical tariff issue in their favor, the carriers filed a supplemental motion to dismiss the complaint. Since matters outside the pleadings had been presented, the district court ruled that the motion would be treated as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, and the parties were permitted to supplement the record as appropriate under that Rule. The parties then filed a joint stipulation of facts for purposes of the carriers' motion only (Pet. App., p. 13). By order dated May 29, 1975, the court granted the carriers' motion and dismissed the complaint (Pet. App., p. 29).

Petitioner appealed to the court of appeals once again. On January 6, 1976, the court of appeals summarily affirmed the district court's decision (Pet. App., p. 31). On February 3, 1976, the court denied petitioner's request for rehearing (Pet. App., p. 32).

REASONS FOR DENYING THE WRIT

A. This Case Arose Out Of a Situation Which Is Not Likely To Recur, And A Decision By This Court Would Be Of Little Or No Precedential Value

This case arose out of a totally unexpected and temporary delay in the regulatory process pursuant to which international air fares are normally established. Such a situation is not likely to recur. If the CAB had acted

on the permanent agreements by May 1, 1973, the date on which they were to have become effective, there would have been no opportunity to call into question whether the April 1 tariffs were proper and effective after May 1, since new tariffs implementing the Board's decision would have been filed immediately. Furthermore, the likelihood of recurrence is made even more remote by the fact that the CAB now routinely requires that tariffs filed in implementation of IATA agreements contain expiration dates coinciding with the expiration dates of the agreements. *See* Stipulation ¶ 13, Pet. App., p. 18. Thus, a decision by the Court in this case would be of little or no precedential value.

Moreover, as developed in the remainder of this brief, the decision of the court of appeals is correct.

B. Since The Fare Charged Petitioner Was Set Forth In Effective Tariffs On File With The CAB, This Action Is Barred By The *Keogh* Doctrine

The CAB has specifically held that the carriers' April 1 tariffs (on which petitioner's fare was based) were the effective tariffs in the transpacific market from April 1 through mid-July. The CAB rejected petitioner's argument in its entirety. Thus, the carriers were required to charge fares in accordance with the April 1 tariffs on and after May 1. If they had not, they would have violated section 403(b). This disposes of petitioner's overcharge claim.

The Board's determination that the April 1 tariffs were effective throughout the relevant period also resolves the antitrust claim. This case falls squarely within the long-established doctrine of *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156. Since the fares in question were specified in, and charged pursuant to, effective tariffs on file with the CAB, the *Keogh* doctrine does not permit an action for damages.

In *Keogh*, the plaintiff, a shipper, alleged that certain ICC-regulated railroads had formed an association "to secure agreement in respect to freight rates among the constituent railroad companies, which would otherwise be competing carriers." 260 U.S. at 160. The complaint alleged further that the rates established by the association were unreasonable and higher than those theretofore charged. The plaintiff sought to recover antitrust damages measured by the difference between the rates set by the alleged agreement and the rates previously charged, "which, but for the conspiracy, would have remained in effect." *Id.*

The Court held that, even accepting the allegations of the complaint as true, it did not "follow that Keogh, a private shipper, may recover damages under § 7 because he lost the benefit of rates still lower, which, but for the conspiracy, he would have enjoyed." *Id.* at 162. The Court made it plain that the effective tariff must control, saying (260 U.S. at 163)—

> Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

As the CAB has found, the fares charged the petitioner here, and the purported class, were those set forth in lawfully filed and effective tariffs. In the words of the Court in *Keogh*, "unless and until suspended or set aside" those fares were, "for all purposes, the legal rate[s], as between carrier" and passenger.

The *Keogh* case was applied by this Court in *Georgia* v. *Pennsylvania Ry. Co.*, 324 U.S. 439, in terms which

are directly applicable here. The Court there said (324 U.S. at 453): "We think it is clear from the *Keogh* case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist." And it went on to say that *Keogh* held (*id.*)—

> that for purposes of a suit for damages a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade. The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier.

This language is directly applicable to the situation in this case.[3]

In the *Keogh* opinion, the Court went on to discuss further the matters on which the petitioner relies here. In this portion of its opinion, the Court referred to the impossibility of proof of damages where rates are subject to the approval of a regulatory agency. It should be pointed out that these additional considerations[4] do not in any way impair the basic holding of the Court in *Keogh* (and in *Georgia*) that the legal rights of the parties "are measured by the published tariff." 260 U.S. at 163.

The petitioner contends that there is no problem of proof of damages in this case such as there was in

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[3] *Keogh* and *Georgia* have been followed by the lower courts. *See, e.g., Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506 (6th Cir. 1972), *cert. denied*, 409 U.S. 1001; *S.S.W., Inc.* v. *Air Transport Ass'n of America*, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955.

[4] In *Hanover Shoe Co.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 491, n.8, the Court referred to these additional arguments as "dictum".

Keogh, and asserts that "In the present case, the old fares [those in effect through March 31, 1973] serve as the basis for measuring damages." Pet., p. 15. In support of this contention, the petitioner points out that, after the CAB disapproved the permanent agreements with respect to the North/Central Pacific area, the carriers refiled tariffs at the pre-April 1 level. There is no dispute as to any of this. But the question whether, as of May 1, 1973, the CAB would have approved fares lower than those contained in the April 1 tariffs, remains purely hypothetical and speculative.

We know that the Board, through its failure to exercise its power of suspension, accepted the continued use of the April 1 tariffs on and after May 1. Perhaps the Board would have accepted a lower fare level, and perhaps not. It is entirely possible, for example, that the filing of lower fares would have precipitated complaints from charter airlines which would have led to the suspension of the fares. The point is that no one, including the CAB, can at this point in time look back to May 1, 1973, and determine the totally subjective question whether the CAB would at that time have accepted tariffs that were never filed.

C. The Events In Question Were Under The Continuing Supervision Of The CAB, Thus Preempting The Operation Of The Antitrust Laws

The petitioner appears to take the position that there can be no antitrust immunity with respect to air carrier activities unless those activities have been approved by the CAB under section 412 of the Federal Aviation Act. This argument fails to recognize that the statutory scheme of the Federal Aviation Act creates implicit antitrust immunity in certain instances. Such implicit antitrust immunity is illustrated by the Court's decision in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, and *Hughes Tool Co.* v. *Trans World*

Airlines, Inc., 409 U.S. 363. In those cases, the Court held that where carrier activities are under the continuing scrutiny of the CAB, and where the CAB has the power to investigate and bring to a halt any unfair practices, the CAB's jurisdiction preempts the operation of the antitrust laws. This principle of preemption is not tied to section 414 of the Federal Aviation Act, 49 U.S.C. § 1384, which grants specific antitrust immunity to agreements approved by the CAB. Rather, it arises by implication from the statutory scheme. Thus, in *Hughes Tool*, the Court stated that "a statutory scheme that does not create a total exception from the antitrust laws may, nonetheless, in particular and discreet instances by implication grant immunity from an antitrust claim." 409 U.S. at 385, n. 14.

The activities of the carriers which petitioner challenges in this action were under constant and close CAB scrutiny throughout the period in issue. The CAB was clearly aware of the filing of both the interim and permanent agreements, and it was also aware that the carriers' April 1 tariffs remained in effect on and after May 1. The CAB could easily have intervened at any time if it had believed that unreasonable fares were being charged or that the carriers were engaged in any unfair practices. In short, the CAB was in command of the entire situation. Thus, with respect to the actions here in question the operation of the antitrust laws was preempted by the regulatory scheme of the Federal Aviation Act.

The *Keogh* doctrine and the preemption rule are neither harsh nor unjust. They recognize that in a regulated industry questions as to the reasonableness of fares, as well as other matters, must of necessity be left to the regulatory process and the agency charged with its administration. Had the CAB believed that the carriers' tariffs contained rates which were unjust or unreasonable during the period in question, it could have suspended them. The CAB did not suspend the tariffs, however, and petitioner cannot complain.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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May 1976

Supreme Court, U. S.
FILED
JUN 17 1976
MICHAEL RODAK, JR., CLERK

No. 75-1603

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OCTOBER TERM, 1975

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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS IN OPPOSITION

This memorandum is submitted in response to petitioner's Reply Brief, in which the petitioner attempts to argue that this Court's decision in *Nader* v. *Allegheny Airlines, Inc.*, No. 75-455, decided June 7, 1976, requires a reversal of the court of appeals' decision in this case or, at least, a remand of the case to the court of appeals for further consideration.

1. The *Nader* decision is inapplicable here. The fare charged in this case was that provided by a tariff duly filed with the Civil Aeronautics Board, as the Board has determined. Thus, the decision below comes squarely within the rule of *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, and *Georgia* v. *Pennsylvania Ry. Co.*, 324 U.S. 439.

There is nothing in the *Nader* opinion which suggests that the Court intended to overrule the *Keogh* and *Georgia* cases. On the contrary, the Court specifically noted that the petitioner in *Nader* was not attacking any tariff provision. It said (Slip Opinion, p. 13):

> Petitioner seeks damages for respondent's failure to disclose its overbooking practices. He makes no challenge to any provision in the tariff, and indeed there is no tariff provision or Board regulation applicable to disclosure practices. (Footnote omitted).

2. The petitioner continues his contention that there were "unauthorized overcharges" in this case. Reply Brief, p. 5. This, of course, begs the question. As the Civil Aeronautics Board, and the courts below, have determined, the charges here were made pursuant to effective tariffs filed with the Board. This fact should control here, and is a clear basis for distinction from this Court's recent *Nader* decision.

Respectfully submitted,

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IN THE

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Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1603

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Petitioners,

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Respondents.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

Since the filing of the petition for certiorari, this Court has decided *Nader v. Allegheny Airlines, Inc.*, No. 75-455 (June 7, 1976), which, for the reasons set forth below, requires a reversal of the decision of the Court of Appeals, or at the least, a remand for consideration in light of that decision.

1. Petitioners have asked this Court to review the decision of the Court of Appeals creating an implied exemption from the antitrust laws which immunized respondents from liability for their price fixing activities and prevented each of 600,000 airline passengers from recovering the resulting $40 overcharge. Respondents have conceded

that their price-fixing agreement was not approved by the CAB as is required for antitrust immunity under §414 of the Federal Aviation Act, 49 U.S.C. §1384 (Stip. ¶26, A. 21). Nevertheless, they argue that an implied exemption from the antitrust laws should be created in order to relieve them from liability for their price-fixing activities, even though this would allow respondents to retain the $24 million that they unlawfully collected from their passengers.

This Court's recent decision in *Nader v. Allegheny Airlines, Inc.*, however, explicitly rejected a similar implied exemption argument which also arose under the Federal Aviation Act. In *Allegheny* the airline contended that the regulatory scheme established by the Federal Aviation Act created an implied exemption from common law tort liability for fraudulent misrepresentation. This Court held that the general supervisory authority of the CAB alone did not provide such immunity, stating that implied immunities exist only where necessary to prevent a collision between two regulatory schemes and only where there is a "direct and unambiguous" conflict rendering the two schemes "absolutely inconsistent." Slip op. at 9. The Court also emphasized that when Congress has sought to confer immunity, it has done so explicitly, citing as an example the antitrust immunity provision of §414 — the very provision that respondents are here charged with failing to follow. In the present case, no conflict exists between the antitrust laws and the Federal Aviation Act because respondents could have easily complied with the dictates of both by simply not charging the higher fares once the approved interim agreement expired. Because respondents chose to continue charging the higher fares well beyond the 30 day

period authorized by the CAB, respondents should not be allowed to retain the profits that they were able to secure only by circumventing the CAB's Orders.[1]

2. In a further effort to convince this Court not to review the lower court's decision, respondents rely heavily on the CAB's March 6, 1975 Order which stated that the interim fares remained in effect throughout the relevant period. When the Court of Appeals initially remanded this case, it instructed the parties to obtain the opinion of the CAB concerning what fares were in effect during the relevant period, calling this the "first critical, and perhaps dispositive, issue in the case." (A. 10). The Court never explained how this issue could dispose of petitioners' antitrust claim, but the implication of this statement is that if respondents had charged effective fares, they would somehow have been immunized from antitrust liability even though they did not satisfy the requirements of §414. This view of the law is at odds with the *Allegheny* decision, which not only refused to preempt an available remedy by implication in the absence of a direct conflict, but also indicated that even the referral to the CAB on the grounds of primary jurisdiction was wholly inappropriate in this case.

The *Allegheny* opinion emphasized that primary jurisdiction is appropriate only in cases where "the issue involves

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[1] The CAB approved the higher fares only for 30 days since respondents had not filed any economic justifications for those fares. To emphasize the temporary nature of this interim approval, the CAB noted that on its face, the interim price-fixing agreement contained an April 30 expiration date. Moreover, the CAB specifically ordered respondents not to file tariffs implementing the permanent agreement prior to CAB approval of that agreement. (Stip. ¶¶ 8 & 10; A. 16-17).

technical questions of fact uniquely within the expertise and experience of an agency — such as matters turning on an assessment of industry conditions." Slip op. at 13. It is not to be used in cases such as this where the "action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice." Slip op. at 14. Here, the issue before the court was one of statutory construction concerning whether respondents had satisfied the conditions necessary for antitrust immunity. With respect to this question of law, as the *Allegheny* opinion states, the "standards to be applied . . . are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case." Slip op. at 14-15 (footnote omitted). Even if the Court of Appeals had been justified in referring the present action to the CAB, there was no basis whatsoever for abdicating its jurisdiction over questions of law and totally deferring to the CAB, especially since the CAB refused to accept briefs, hear argument, or even discuss the legal issues, but only recited the undisputed facts of this case. (A. 24).[2]

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[2] The same analysis also applies to petitioners' statutory claim that respondents violated §403(b) of the Federal Aviation Act, 49 U.S.C. §1373(b), by charging the higher fares contained in the interim tariff during the relevant period, because the effect of the CAB's Orders was to cancel the interim tariff when the interim agreement expired at the beginning of the relevant period. Like petitioners' antitrust claim, the statutory claim also presented issues of law which courts are competent to decide, not technical issues of fact that have been assigned to the CAB.

3. In urging the Court not to review the lower court decision, respondents also assert that they are not likely to repeat the actions which gave rise to this lawsuit and that an opinion of this Court would be of little precedential value. However, this contention, which respondents have chosen to make their lead argument, completely obscures the fact that unless this Court grants certiorari, respondents will be able to retain $24 million in unauthorized overcharges, and petitioners will be left completely without a remedy.

Moreover, this case raises important questions concerning implied antitrust exemptions and the interaction between the antitrust and regulatory schemes. While this Court held in *Allegheny* that the Federal Aviation Act does not preempt other remedies in the absence of an irreconcilable conflict, slip op. at 9, the Court of Appeals reached the opposite result, believing it to be so clearly correct that no explanatory opinion was even needed. The wide divergence between these two legal interpretations indicates that Supreme Court guidance is needed.

For the reasons stated herein and in the petition for a writ of certiorari, this Court should review the lower court's decision.

Respectfully submitted,

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